No. 83-305

In The
Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

JOHN K. VAN DE KAMP
Attorney General

WILLIAM D. STEIN
Assistant Attorney General

GLORIA F. DE HART
Deputy Attorney General

CHARLES R. B. KIRK
Deputy Attorney General

6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3944

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TOPICAL INDEX

TABLE OF CASES

TEXTS, STATUTES & AUTHORITIES

TABLE OF CASES—Continued

No. 83-305

In The

Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

ARGUMENT

I

The Facts Necessary For Resolution Of The Issues Are Clearly Presented.

There is a great disparity between the statement of facts included in Petitioner's Brief and that found in Respondents'. The vast majority of the "facts" cited by Respondents are not facts at all, but declarations or testimony advanced in support of their cases at various stages of the proceedings. But there were no factual findings in

Ward or *Berry*, and the facts determined in *Trombetta* (and its derivative, *Cox*) are limited to those relating to the functioning of the Intoxilyzer, as discussed in Judge Antolini's order (J.A. 40-43). The facts found by Judge Antolini are sufficient for purposes of resolving the first question we have addressed to this Court: Does a duty to preserve evidence under federal due process forbid the use in a drunk driving case of a breath test machine which automatically expels and thus destroys the breath sample during the test process?

In their statement of facts, Respondents make much of the "Indium tube," a remote sample capturing device.[1] Use of the indium tube is limited to subsequent analysis with the Intoximeter brand gas chromatograph, for which it is an approved accessory. See California Department of Health Services, List of Approved Instruments and Related Accessories Approved for Breath Alcohol Analysis (December 20, 1979) pp. 6-7, 12. It is not approved for use with any other testing device, including a competing brand of gas chromatograph. *Id.*, at pp. 1,5, 8-11. It was stipulated in the *Trombetta* case that the indium tube device for capturing a breath sample for later retesting existed when the Intoxilyzer was used to test the defendant (J.A. 182-184). It is, in fact, a matter of public record that the indium tube has been approved in California for remote sample collection since 1974. See California Department

---

[1]There are also repeated references to the greater specificity of the gas chromatograph contained in Respondents' factual statement and utilized as a basis for argument in their brief (i.e., p. 37). The greater specificity of the gas chromatograph has been judicially rejected as a basis for discounting the accuracy of the Intoxilyzer. See *Intoximeters, Inc. v. Younger* (1975) 53 Cal.App.3d 262, 269-270, 125 Cal.Rptr. 864, 869-870.

of Health, Summary of Activities Relating to Evaluation of Instruments and Accessories for Breath Alcohol Analysis, Report No. 2 (Feb. 1974) Table 10, p. 6. But what Respondents overlook is the qualification upon the stipulation, as noted by Judge Antolini, that such devices could not be used with the Intoxilyzer (J.A. 182). Similarly, the defense's own witness testified in *Trombetta* that the indium tube was not approved for use with the Intoxilyzer nor could be physically adapted to it (R.T. 78:22 to 79:3).[2] Respondents also refer to the silica gel method now used in Colorado throughout their statement of facts, yet concede that "This adaptation has not yet been approved for use in California. . . ." (Respondents' Brief, p. 6) There were no factual findings as to the accuracy of the method.[3]

---

[2]This part of his testimony is omitted from that portion of the transcript which Respondents included in the Joint Appendix; the omission being indicated by asterisks at J.A. 188.

[3]Not only are there no factual findings in the record regarding the silica gel method, but what the California Court of Appeal did was to rely upon the decision in *Garcia v. Dist. Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924, 928-929—which stated that preservation methods did exist, without specifying them—for its own determination that such methods were available. 142 Cal.App.3d, at 144, 190 Cal.Rptr., at 322-323, J.A. 159. Such blind acceptance was unwise. See *Montoya v. Metropolitan Court* (N.M. 1982) 651 P.2d 1260, 1261. The developer of the "Toxitrap" silica gel tube has now conceded that: "It is scientifically impossible to achieve the same degree of precision and accuracy in samples that are trapped, desorbed, and reanalyzed than are achieved using frequently calibrated, stationary primary evidential breath testing equipment." Letter of Dr. Donald R. Wilkerson, 29 J. Forensic Science 7 (1984).

That states such as Colorado may permit attacks upon an evidential breath testing instrument with a trapped sample having an 80% error rate is an evidentiary choice Colorado is free to make, but should not be constitutionally impressed upon California or any other state which insists that sample-retention systems have the same degree of accuracy as evidential breath-test devices.

As Judge Antolini's order notes—and it does not appear to be challenged by Respondents—"Without an addition to the present intoxilyzer unit is appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample." (J.A. 41.) The record clearly establishes that no approved device exists to preserve a breath sample analyzed on an Intoxilyzer.

Indium tubes and silica gel tubes are really red herrings. The existence or non-existence of any breath capturing device is in fact irrelevant to the question Petitioner has presented to this Court. The facts in this case demonstrate that the law enforcement agencies involved did *not* use a device which preserved anything for the defendant's use, and that the instrument actually utilized automatically destroyed the temporarily-captured sample after the analysis was performed. What Respondents suggest is that the Constitution requires use of an instrument which preserves something. This outlines the second question we have presented to this Court: Does a duty to preserve evidence under federal due process compel law enforcement to gather evidence for use of the defendant? For if law enforcement must utilize an entirely separate device—such as an indium tube or anything else—to collect another sample for the defendant, then it is indeed in the business of collecting evidence for the defense, a step far beyond anything ever required by this Court.

II

Emergency Legislation Has Not Rendered The Issues Moot.

Adverting to new California Vehicle Code section 13353.5, respondents and their *amici* seem to suggest that

the *Trombetta* problem has been "solved" and that the issue is now moot.[4] That is not correct. There has been no

---

[4]This legislation was enacted in direct response to the dilemma which *Trombetta* poses: a requirement to utilize an instrument which keeps something for defense referee testing, but no instruments or devices which do so. See Cal.Stats. 1983, ch. 841, sec. 4 (5 Deering's Adv. Leg. Serv. 756). It was emergency legislation which went into effect on September 15, 1983.

By means of a letter of July 20, 1983, the California Department of Health had previously advised all forensic alcohol laboratories that:

> "[A]ttachment of a breath sample-capturing device to an approved breath testing instrument can void the approval. Approval of a breath testing instrument extends only to that instrument and its accessories approved by the Department of Health Services through laboratory evaluation [citation]. To date, no breath testing instrument with an accessory for directly capturing the breath sample has been approved. If any . . . laboratory supervising the use of breath testing instruments wishes to attach a sample-capturing device to an already-approved instrument without voiding approval of that instrument, it may do so only by obtaining approval of the Department . . . of the sample-capturing technique [citation]. To be considered for approval, the laboratory must submit its precautionary checklist and its experimental data demonstrating that an instrument, after modification, continues to meet the standards set forth in the regulations [citation]. To be considered for approval, the laboratory must submit its precautionary checklist and its experimental data demonstrating that an instrument, after modification, continues to meet the standards set forth in the regulations [citation].
>
> " . . . [A]pproval of a sample-capturing technique in conjunction with an approved instrument will not extend to the sample-capturing device itself, but is limited to the instrument as modified by the sample-capturing technique. No sample-capturing device has been approved by the Department . . . for referee analysis. . . . At the present time, however, the Advisory Committee on Alcohol Determination has concluded that no breath sample-capturing device exists that has the scientific reliability of a breath testing instrument." (Footnote omitted.)

(Continued on next page)

judicial construction of the statute, which was enacted in light of the concurring opinion in *Trombetta II*.[5] See 142 Cal.App.3d, at 145, 190 Cal.Rptr., at 323, J.A. 161. Whether the California courts will find the emergency legislative remedy adequate to the constitutional purpose is unknown. But if there is no constitutional duty to preserve a breath sample for the defense and no violation in utilizing an instrument which automatically expells a sample only temporarily collected, then the issue will never arise.

In any event, the new legislation has no applicability to the parties directly before the Court. Furthermore, dependent upon how the California courts interpret the passage in *Trombetta II* which applies the rule to other persons "only after this decision has become final," 142

(Continued from previous page)

Similarly, the Ad Hoc Committee on Breath Alcohol Sample Retention of the Public Health Liason Committee of the California Association of Criminalists in a letter of April 3, 1984, has indicated (p. 4) that:

> "It is clear from the available literature that there are limitations to the reliability of all of the currently available breath capture devices. Therefore, the finding of different results using a capture device as compared to an immediate breath test instrument cannot be construed to mean that the breath instrument was in error. On the contrary, the most likely explanation would be that the capture device was in error."

The retention and reanalysis difficulties caused this committee to recommend *against* breath sample retention for referee purposes, and utilize blood or urine instead. (*Id.*, at pp. 4-6.) This is the current state of California law. Cal. Veh. Code, section 13353.5.

[5]The *Trombetta I* majority opinion did mention the possibility of a waiver of collection rights. 141 Cal.App.3d, at 406, J.A. 145. This language ominously disappeared from *Trombetta II*.

Cal.Appd3d, at 144, 190 Cal. Rptr., at 323, J.A. 160, the rule of *Trombetta* may apply to thousands of drunk drivers who were tested before the statute was enacted.[6]

Even after the statute became effective, numerous California cases are still affected by *Trombetta II* since in the initial days after emergency passage, officers were frequently unaware of the new statute and did not give the admonition until new directives informed them of this change.

Furthermore, enactment of California Vehicle Code section 13353.5 does not alter the fact that the question presented here is of significant continuing national importance. Breath-testing instruments are utilized in every state, the District of Columbia, and Puerto Rico. The question of the necessity of sample retention thus vitally impacts virtually every law-enforcement agency subject to the jurisdiction of this Court. In our petition for certiorari (pp. 13-14), we noted that several state courts have already addressed the issue with varying results. *Amicus* briefs in support of Petitioner's position have been filed literally from every corner of the country, clearly demonstrating the national concern over the decision below, and underscoring the importance of a decision by this Court.

III

The Constitution Does Not Require Proof Beyond All Possibility Of Doubt.

The Constitution does not require proof beyond all possibility of doubt. *E.g., Holt v. United States* (1910) 218

---

[6]The date of "finality" of the decision is an open question, and is not resolved as the *amicus* brief of the State Public Defender suggests (fn. 5, pp. 7-8), by simply looking to California Rule of Court 25(a). The effect of a stay of remittitur has never been construed.

U.S. 245, 254; *Dunbar v. United States* (1895) 156 U.S. 185, 199. Yet apparently what Respondents and their *amicus* seek is proof of the level of intoxication beyond any possibility of doubt in a drunk driving case, for that is the effect of requiring the preservation of a breath sample for defense testing.

It is the official position of the Advisory Committee for the California Department of Health that in California, "[T]he procedures for 'immediate analysis' of breath samples required by the California regulations leave no room for undetected error because of the scientific confidence derived from these procedures." Advisory Committee on Alcohol Determination, California Department of Health, Notes of Meeting of December 14, 1982, p. 17. A good example is that which is the focus of the *amicus* brief filed by the California Public Defender's Association: radio interference. According to their brief (pp. 30-31), radio transmissions can generate a false reading of as high as .45 on a breath alcohol device. Yet under California procedures, not only must two evidential breath tests be administered upon the subject which must agree by .02, but a total of three "blank" tests must also be run on the instrument with a resultant reading of .00. See *People v. French* (1978) 77 Cal.App.3d 511, 518-520, 143 Cal.Rptr. 782, 785-786. Obviously the false .45 reading would not go undetected, which is the purpose of the California regulatory scheme. Respondents focus upon the possibilities of breath acetone in a breath sample (Respondents' Brief, p. 33). Yet support for this possibility is within the defendant's own grasp, since as a predicate to making such an objection to an Intoxliyzer result he should be required to show that he was dieting and capable,

on that diet, of giving a false positive reading on the Intoxilyzer due to acetone, a demonstration which he can easily make with any existing Intoxilyzer. *Cf. United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867, 871. Other "possibilities of error" can be conceived, and similarly rebutted. As this Court has noted, the "possibilities" of error with regard to any kind of evidence are limited only by "the imaginations of judges or defense counsel." *Id.*, at 867. Dut process does not require that such possibilities be proven wrong with physical evidence demonstrating otherwise.

Years ago in *People v. Miller* (1975) 52 Cal.App.3d 666, 670, 125 Cal.Rptr. 341, 343, the Court of Appeal pointed out the unsettling result of demanding "absolute proof" by requiring that everything which could be made into some demonstrable form be so transformed. In any criminal case, there are features which are undoubtedly "material" and in fact central to proof of the crime, such as the crime scene itself. But must the crime scene be videotaped from every angle? Must everything at the scene be taken into possession and preserved? Must the crime scene be hermetically sealed to permit full exploration of the facts? Must every witness be tape recorded? Must every note be kept? The possibilities are endless. But such preservation is not required by due process, and is not necessary to insure a fair trial. In the case of the Intoxilyzer, the machine itself remains available for testing; the test protocol is reflected in the printed card; the officer administering the test is available for cross-examination. Due process requires no more.

CONCLUSION

A logical extension of the preservation duty Respondents and the court in *Trombetta II* would require obliges law enforcement to reduce everything to a physical form and keep it in possession for possible use by a defendant. This is not mandated by due process; it is not necessary for a fair trial. The decision below is wrong and should be reversed.

DATED: April 9, 1984

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
of the State of California

WILLIAM D. STEIN
Assistant Attorney General

GLORIA F. DE HART
Deputy Attorney General

CHARLES R. B. KIRK
Deputy Attorney General

6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3944

Attorneys for Petitioner